

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WHW, INC. and BOBBY WILLIAMS,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-142

ORDER ON SUMMARY
JUDGMENT

Appellants WHW, Inc. and Bobby Williams (WHW) are challenging a \$40,000 penalty issued by the Washington Department of Ecology (Ecology) for alleged violations of dangerous waste laws and regulations in connection with a spill of soda ash onto the ground adjacent to SR 397 and Finley Road in Finley, Washington. WHW and Ecology have both filed motions for summary judgment in the case. The WHW motion seeks dismissal of the case on the basis that Ecology did not have the authority to penalize under the dangerous waste laws and regulations because the material spilled was not dangerous waste. Ecology has filed a partial summary judgment seeking a ruling that the soda ash was a dangerous waste.

In considering the motion, the Board, comprised of William H. Lynch and Kathleen D. Mix, reviewed the following submissions:

1. Appellants' Motion for Summary Judgment.
2. Declaration of Josh Whited with Ex. A-K.

3. Declaration of Bobby Williams in Support of Appellants' Motion for Summary Judgment.
4. Ecology Motion for Summary Judgment on Issue (1)(a).
5. Declaration of Alexandra K. Smith in Support with Ex. A-I.
6. Declaration of Richard Granberg with Ex. A-H.
7. Ecology Response to Appellants' Motion for Summary Judgment.
8. Declaration of Alexandra K. Smith in Support of Ecology Response.
9. Declaration of Richard Granberg in Support of Ecology Response.
10. Appellants' Response to Ecology's Motion for Summary Judgment on Issue (1)(a).
11. Declaration of Mike Kendall in Support of Appellants' Response.
12. Ecology Reply Brief in Support of Its Motion for Summary Judgment on Issue (1)(a).
13. Declaration of Alexandra K. Smith in Support of Ecology's Reply with Ex. A.
14. Reply in Support of Appellants' Motion for Summary Judgment with Appendices A, B, and C.
15. Second Declaration of Mike Kendall.

The matter was decided on the record without oral argument. Based upon the records and files in this case and the evidence submitted, the Board enters the following decision.

1 Facts

2 WHW is a small, family-owned trucking company headquartered in Billings, Montana,
3 that specializes in dry and liquid bulk transportation throughout the western United States.
4 Company policy is cognizant of environmental regulations and strictly prohibits a driver from
5 disposing of or cleaning out residual material to the ground. WHW has a good compliance
6 record and has not been the subject of environmental enforcement action related to its business in
7 the past. (Williams Declaration ¶3, 4).

8 On or around April 15, 2005, WHW driver, Joseph Lambe, was driving a truck that had
9 been loaded with soda ash at Solvay Chemicals in Wyoming. He had delivered the load to
10 Bullseye Glass in Portland, Oregon, and then proceeded to Finley, Washington, to pick up
11 fertilizer at the Agrium facility. The truck was weighed at Agrium and was over-weight,
12 indicating the presence of residual material in the trailer. After leaving the Agrium plant, Mr.
13 Lambe apparently opened the release valve on the trailer and soda ash began escaping from the
14 tank. (Williams Declaration ¶6). The truck dumped approximately 17,000 pounds of soda ash
15 along the roadway in the vicinity of SR 397 and Finley Road. The spill extended for
16 approximately three-quarters of a mile, and a portion of the spill lay across the street from Finley
17 Middle School. (Granberg Declaration ¶4).

18 The State Patrol and the local fire department both responded to the spill and consulted
19 existing lists of hazardous substances to determine whether hazardous waste crews were needed
20 on site. They did not find soda ash listed as a hazardous material and did not notify Ecology of
21 the spill. They did notify the driver that the spilled material would need to be cleaned up. The

1 driver indicated he had contacted the company about the spill, but this fact is in dispute.
2 (Granberg Declaration, Ex. F). The next morning, April 16, 2005, Mr. Lambe returned to
3 Agrium, picked up the load of fertilizer, and left the area. (Williams Declaration ¶6).

4 Ecology was first notified of the spill on April 18, 2005, by a confidential source, and the
5 agency responded on April 19, 2005. Ecology conducted a field test of the soda ash to determine
6 if it designated as a corrosive waste under the State's regulations. The field test yielded a pH
7 reading between 12 and 13. The dangerous waste standard for corrosivity is 12.5. Ecology took
8 a sample of the soda ash for laboratory analysis and that sample later tested with a pH of 12.11.
9 The Ecology inspector also evaluated whether the soda ash was a dangerous waste based on
10 toxicity. Ecology conducted a book designation of the waste, pursuant to WAC 173-303-100(5),
11 by reviews of available resource and database materials.¹ This data indicated soda ash is toxic to
12 rats when given to them orally. This was referred to as failing the LD50 "Oral Rat" criteria.
13 (Granberg Declaration ¶5, 6). Accordingly, Ecology considered the material a dangerous waste
14 under WAC 173-303-070(3)(iv) and WAC 173-303-100. In addition, the Material Safety Data
15 Sheet later provided to Ecology by WHW details health hazards associated with soda ash
16 including irritation to ear, nose, throat, and respiratory tract, severe eye irritation, risk of serious
17 or permanent eye lesions, and risk of burns to mouth, throat, esophagus and stomach if ingested.
18 To prevent harm from soda ash, protective clothing is recommended for those handling soda ash.

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20 ¹ Ecology used toxicity data from the SIRI database, which has the same toxicity data as the National Institute for
21 Occupational Safety and Health's (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS) database.
The data showed oral rat toxicity at 4,090 mg/kg. Substances with 500-5,000 mg/kg on the oral rat toxicity criteria
are identified under WAC 173-303-100(5)(b)(i) as Toxic Category D materials. (Granberg Second Declaration 4,5);
(Smith Declaration, Ex. A).

1 The data safety sheet also specifically indicated soda ash should be kept away from children.
2 (Granberg Declaration, Ex. E, Whited Declaration Ex. J).

3 Ecology notified WHW of the spill on April 19, 2005, and informed the company of its
4 responsibility to clean up the spilled material. The timing and exact content of ensuing
5 conversations between WHW and Ecology are in dispute, but WHW did arrange for a cleanup
6 contractor to address the spill. The cleanup was begun on April 20, and completed on April 21,
7 2005. The material removed and the material contaminated by the soda ash were put in 55-
8 gallon drums for storage pending further information about the nature of the material and the
9 proper method of disposal. (Granberg Declaration ¶12).

10 A battery of tests was performed on the spill material. The test results showed the
11 material ranged from a pH of 11.06 to 12.11, slightly below the corrosivity standard of 12.5 pH.
12 As a result, the soda ash was not considered a dangerous waste for its corrosive properties.
13 Toxicity testing was conducted which revealed a mortality rate for rainbow trout of only three
14 percent. Based on the toxicity test results, the soda ash did not meet the criteria for designation
15 as a dangerous waste based on toxicity. Ecology reviewed the test results submitted by WHW
16 and determined the material was no longer designated as dangerous waste and could be disposed
17 of at a non-hazardous waste facility. (Whited Declaration, Ex. H). The material was
18 subsequently disposed of as a non-dangerous waste at a landfill in Boardman, Oregon.
19 (Williams Dec. at 4 ¶12). Ecology later assessed a penalty against WHW of \$40,000 for
20 violations of dangerous waste regulations and that penalty is on appeal in this case.

1 Analysis

2 Ecology has filed a motion for summary judgment seeking a ruling that the soda ash was
3 a dangerous waste. WHW has filed a summary judgment seeking a ruling that the soda ash was
4 not a dangerous waste and that Ecology exceeded its authority by issuing a dangerous waste
5 penalty because there was no dangerous waste involved. (Issues 1(a) and 1(b) from the Pre-
6 Hearing Order). The WHW motion seeks invalidation of the entire penalty and dismissal of the
7 case. The Board does not find the ultimate characterization of the waste, alone, determinative of
8 the case.

9 Ecology Authority

10 The Notice of Penalty in this matter identifies three grounds for penalizing WHW: (1)
11 failure of the generator to determine whether the waste was a dangerous waste,² (2) failure to
12 notify authorities and Ecology of the spill,³ and (3) failure to clean up the spilled material.⁴
13 Under the state HWMA, Ecology implements “cradle to grave” regulation of hazardous and
14 dangerous waste to ensure they are managed in a manner than protects human health and the
15 environment. RCW 70.105.007. The Dangerous Waste Regulations contained in WAC Chapter
16 173-303 were promulgated to implement the state HWMA and the state’s responsibilities under
17 the federal Resource Conservation and Recovery Act (RCRA). Identification of dangerous
18 wastes and safe handling of such wastes are among the enunciated purposes of the regulations:

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20 _____
21 ² WAC 173-303(1)(a) & (b)

³ WAC 173-303-145(2)(a)

⁴ WAC 173-303-145(a)(i)

- (1) Designate those solid wastes which are dangerous or extremely hazardous to the public health and environment;
- (2) Provide for surveillance and monitoring of dangerous and extremely hazardous wastes until they are detoxified, reclaimed, neutralized, or disposed of safely;
- (3) Provide the form and rules necessary to establish a system for manifesting, tracking, reporting, monitoring, record keeping, sampling, and labeling dangerous and extremely hazardous wastes.

* * *

WAC 173-303-010

The dangerous waste regulations specifically impose a responsibility on solid waste generators to evaluate the nature of their waste under WAC 173-303-070. A “solid waste” is defined as “any discarded material” not otherwise excluded from the regulations. WAC 173-303-016(3)(a). A material is “discarded” if it is abandoned by being disposed of. WAC 173-303-016(3)(b)(i); WAC 173-303-016(4)(a).

The regulations require a person generating a solid waste to designate the waste by following the procedures outlined in WAC 173-303-070(3):

- (a) This section describes the procedures for determining whether or not a solid waste is DW or EHW.
- (b) ***The procedures in this section are applicable to any person who generates a solid waste (including recyclable materials) that is not exempted or excluded by this chapter or by the department.*** Any person who must determine whether or not their solid waste is designated must follow the procedures set for in subsection (3) of this section. Any person who determines by these procedures that their waste is designated DW or EHW is subject to all applicable requirements of this chapter.

1 WAC 173-303-070(1)(a)&(b)(emphasis added). This regulation requires all generators of solid
2 waste to designate whether the waste is dangerous, unless the waste is exempted or excluded.⁵

3 The regulations spell out the steps a generator of solid waste must take to determine
4 whether the solid waste designates as a dangerous waste. WAC 173-303-070(3). First, the
5 generator must determine if the waste is a listed discarded chemical product (*i.e.* specifically
6 listed in the regulations), and therefore a dangerous waste. Second, the generator must determine
7 if the waste is a listed dangerous waste source, and therefore a dangerous waste. WAC 173-303-
8 070(3)(a)(ii). Third, if the waste is not on the dangerous waste lists, the generator must
9 determine if the waste exhibits any of the characteristics (ignitability, corrosivity, reactivity, and
10 toxicity) that would cause it to designate as dangerous. WAC 173-303-070(3)(a)(iii). Fourth, if
11 the waste is not listed, and does not exhibit dangerous waste characteristics, the generator must
12 determine if the waste meets any of the dangerous waste criteria in WAC 173-303-100. WAC
13 173-303-070(3)(a)(iv). *See, Hickie v. Whitney Farms, Inc.* 148 Wn.2d 911, 921, 64 P.3d 1244
14 (2003). The generator's responsibility to designate its waste is not dependent on whether the
15 substance ultimately is or is not determined to be dangerous waste.

16 In this case, the responsibility to designate arose at the time the WHW driver chose to
17 discard the soda ash on the shoulder of a public road. At that time the material became solid
18 waste and the duty to designate was operative.⁶ Even though the material may have been
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20 ⁵ No argument has been made that soda ash was exempt or excluded from WAC 173-303-070.

21 ⁶ Pursuant to Federal Regulations solid waste is to be evaluated at the point of generation, which is the point when a
material first becomes a solid waste. 55 Fed. Reg. 11798 @ 11830 (March 29, 1990)(Smith Declaration, Ex. G);

1 characterized as non-dangerous two to three weeks later, WHW had a duty to designate the waste
2 at or before the time it was placed on the ground. Therefore, even though the waste fell slightly
3 below the dangerous waste standard after later laboratory toxicity testing, that result alone does
4 not preclude Ecology from assessing a penalty for failure to comply with the duties governing
5 solid waste generators. WHW's motion for summary judgment dismissing Ecology's penalty
6 solely on the basis that the waste was eventually considered non-dangerous is appropriately
7 denied.

8 Characterization of the Soda Ash

9 The undisputed facts demonstrate that the WHW driver chose to simply drive away from
10 the spill and that neither he, nor the company, designated the waste. When Ecology became
11 aware of the spill two days later, the agency undertook an immediate evaluation of the waste
12 under the designation standards in WAC 173-303-070(3). A field test of the material resulted in
13 a pH reading at or around the standard for designation as a dangerous waste based on corrosivity.
14 The material safety data sheet confirmed this concern by indicating soda ash could irritate eyes,
15 nose, and throat and could cause permanent lesion to eyes. A book designation performed by
16 Ecology personnel indicated soda ash was properly designated as a dangerous waste based upon
17 its toxic effect on rats reported in the LD50 oral rat test.⁷ Based upon the information available
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19 EPA Faxback 11631 at 1 (Smith Declaration, Ex. I). Ecology's program for dangerous waste regulation is
20 authorized by the Environmental Protection Agency on the condition that the HWMA and accompanying
regulations are equivalent to and no less stringent than the federal RCRA scheme. 59 Fed. Reg. 55322 (November 4,
1994).

21 ⁷ WHW has argued the book designation was improper or unsound, but insufficient evidence supporting the
argument has been submitted to justify invalidation of the designation.

1 soon after the spill, Ecology properly designated the material as dangerous waste and expected
2 the generator, WHW, to treat the waste as such. The duty to notify authorities and the duty to
3 clean up the spill are applicable to the generator of dangerous waste and were applicable to
4 WHW while the soda ash was reasonably categorized as dangerous waste.

5 WHW argues that it was not required to comply with the duties imposed on a generator
6 of dangerous waste because the soda ash ultimately tested as non-corrosive and non-toxic. In
7 essence, WHW would have these later test results relate back to the time the waste was generated
8 to exonerate the company from its duties under the Dangerous Waste Regulations. Such a
9 limited interpretation of the duties incumbent on a generator of waste would be inconsistent with
10 regulations' overriding concern for protecting the public health. When a substance is dumped on
11 the ground, the generator is in the best position to know its components and evaluate its
12 dangerous characteristics. Placing responsibility to designate on the generator of potentially
13 dangerous materials is not unduly burdensome. The court in *Hickle v. Whitney Farms, Inc.* 148
14 Wn.2d 911, 919, 64 P.3d 1244 (2003) acknowledged that generators of solid waste have a duty
15 to determine whether or not their wastes are regulated by the HWMA.

16 A generator of solid waste can avoid the responsibility to treat a particular substance as
17 dangerous waste by engaging in the designation process prior to releasing the material into the
18 environment. In this case, through the unfortunate actions of its driver, WHW discharged a
19 substantial amount of soda ash onto the public road without designation. At the outset, the soda
20 ash was properly treated as dangerous waste based on Ecology's book designation of the
21 substance as toxic to rats. WHW's duties as a generator arose at that time under the controlling

1 regulations and did not end until test results further defining the material's characteristics were
2 produced. At the point, the laboratory bioassay data took precedence over the earlier book
3 designation pursuant to WAC 173-303-100(5)(d). WHW was then relieved of further
4 responsibility to treat the soda ash as dangerous waste.

5 Under the facts of this case, the Board concludes the soda ash was properly considered a
6 dangerous waste from the time it was book designated by Ecology until the bioassay results were
7 evaluated and accepted by Ecology. Accordingly, the Ecology motion and for summary
8 judgment that the soda ash was dangerous waste is granted in part and denied in part. Likewise,
9 the WHW motion that the soda ash was not a dangerous waste is granted in part and denied in
10 part.

11 Ecology has raised WAC 173-303-016 as an alternate basis for regulating the spilled
12 material. In rendering this decision, the Board does not reach the issue of whether the manner of
13 use or handling of a material alone would support imposition of a penalty under the HWMA.⁸
14 Ecology's citation of WAC 173-303-960 as an independent basis for enforcement action is not
15 persuasive because the language in the regulation addresses the process available for
16 enforcement rather than the parameters of Ecology's penalty jurisdiction.

17 The record contains a number of facts indicating that WHW was responsive to the spill
18 after Ecology notified the company of the situation and that a considerable amount was spent
19 cleaning up the site. The driver involved in the spill was terminated from his employment in
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21 ⁸ It should also be note this regulation was not referenced by Ecology in the Notice of Violation or Penalty.

1 direct response to this incident. Some of the details surrounding when the company first learned
2 of the spill and when the specific arrangements for cleanup were made are in dispute and will
3 undoubtedly be fully developed at the hearing. These facts, however, are relevant to the
4 reasonable amount of the penalty, not the existence of a violation.

5 Based upon the foregoing analysis the Board enters the following:

6 ORDER

7 The Ecology motion for summary judgment is GRANTED in part and DENIED in part.
8 WHW's motion on the nature of the soda ash is GRANTED in part and DENIED in part. The
9 soda ash was properly treated as dangerous waste from the time it was spilled onto the ground
10 until the laboratory test results established it did not designate as a dangerous waste. WHW, as
11 the generator of the waste, had duties under the controlling regulations, violations of which could
12 properly form the basis for a penalty assessment. Therefore, dismissal of Ecology's penalty on
13 the basis the agency lacked the authority to assess a penalty for handling of the soda ash is
14 unwarranted under the facts and circumstances of this case and the WHW motion for summary
15 judgment of dismissal is DENIED.

16 SO ORDERED this 30th day of March 2006.

17 POLLUTION CONTROL HEARINGS BOARD

18 WILLIAM H. LYNCH, CHAIR

19 KATHLEEN D. MIX, MEMBER

20 Phyllis K. Macleod
Administrative Appeals Judge

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